

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

DARIUS KHALEGHI,

Plaintiff,

V.

THE STATE OF WASHINGTON;
DEPARTMENT OF SOCIAL AND
HEALTH SERVICES ("DSHS"), and its
employees TROY HUTSON, LEO
RIBAS, DAVID STILLMAN and
ADOLPHO CAPISTANTI.

Defendants.

CASE NO. C10-5360BHS

ORDER GRANTING IN PART
AND DENYING IN PART
DEFENDANTS' MOTION
FOR PARTIAL SUMMARY
JUDGEMENT

This matter comes before the Court on Defendants' motion for summary judgment (Dkt. 47). The Court has considered the pleadings filed in support of and in opposition to the motion and the remainder of the file and hereby grants in part and denies in part Defendants' motion for the reasons discussed herein.

I. PROCEDURAL HISTORY

On April 28, 2011, the Court denied Plaintiff's ("Khaleghi's") motion for partial summary judgment on the issue of liability against Defendants DSHS and Troy Hutson ("Hutson"). Dkt. 46. On June 2, 2011, Defendants filed the instant motion for summary judgment as to all claims. Dkt. 47. On June 20, 2011, Khaleghi responded in opposition to the Defendants' motion. Dkt. 55. On June 24, 2011, Defendants replied. Dkt. 57.

II. FACTUAL BACKGROUND

This is an employment discrimination and retaliation action filed under Title VII, 42 U.S.C. § 2000e, et seq. (“Title VII”), and RCW 49.60, et seq (“WLAD”)¹. Complaint (Dkt. 1) ¶¶ 3.1, 3.2. The matter arises out of Khaleghi’s allegations against his former supervisor, Troy Hutson (“Hutson”), and employer, the Department of Social and Health Services (“DSHS”). *See* Dkt. 1 (Complaint).²

Khaleghi is an Iranian-American who immigrated to the United States in 1986. Complaint ¶ 2.1. Immediately prior to working for DSHS, Khaleghi worked for the Washington State Department of Veterans Affairs (“DVA”). *Id.* On July 16, 2008, Khaleghi became the new Director of the Operation Support Division (“OSD”), a division of the Economic Services Division (“ESA”). Complaint ¶ 2.2. The OSD at ESA “is responsible for the planning, budgeting, purchasing, contracting, performance management, quality, and all operational aspects of the [ESA] in support of Division of Child Support (“DCS”) and Community Services Division (“CSD”).” *Id.* ESA has three directors, each of which report to and serve at the pleasure of the Assistant Secretary, Hutson. *See, e.g., id.*

A. Discrimination Claim, National Origin

Khaleghi alleges that Defendants are liable for an adverse employment act related to the acts of Adolpho Capistanti (“Capistanti”). At all relevant times, DVA employed Capistanti; Capistanti and Khaleghi were both at DVA in 2007 and until Khaleghi left for ESA in 2008. Khaleghi alleges that Capistanti engaged in discriminatory conduct directed at him due to his Iranian heritage. Khaleghi alleges such conduct took place for a finite period in 2007 and then again during his hiring process with DSHS in 2008.

¹WLAD is an acronym for Washington Law Against Discrimination.

²During the course of this case, Khaleghi voluntarily dismissed former Defendants David Stillman, Leo Ribas, and Adolpho Capistani. Dkts. 35, 51, 52.

1 It is undisputed that, in 2007, Capistanti made a series of prank calls to Khaleghi.
2 Khaleghi does not allege that Capistanti made any racial remarks or otherwise invoked
3 his Iranian heritage during any of the prank calls. *See, e.g.*, Declaration of Matthew T.
4 Kuehn (Kuehn Decl.), Dkt. 48, Ex 1 (Deposition of Khaleghi (Khaleghi Dep.) at 64-66).
5 Capistanti denies that his prank calls were racially motivated. *See* Declaration of Adolpho
6 Capistanti (Capistanti Decl., Dkt. 49) ¶¶ 12-14. It is undisputed that Khaleghi does not
7 know if Capistanti knew at the time of the prank calls that Khaleghi was Iranian. It is also
8 undisputed that the prank call matter was resolved and Capistanti was reprimanded for his
9 actions. In the absence of Capistanti offering an alternative motivation for the calls or in
10 the absence of any other self-perceived reason for the prank calls, Khaleghi alleges that
11 the only basis for the calls must be his Iranian background. *See, e.g.*, Khaleghi Dep.
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13 Although Khaleghi does not allege any other inappropriate contact between
14 himself and Capistanti, he does allege that Capistanti interfered with and delayed his start
15 date at ESA. Complaint ¶ 2.8. Khaleghi announced to DVA that he would be leaving to
16 work for ESA, effective June 30, 2008. Hutson Decl. ¶ 19, Ex. 2 (letter from Khaleghi to
17 DVA). While Hutson did offer the OSD position to Khaleghi, Hutson did not plan for
18 Khaleghi to start until July 17, 2008. *See id.*, Ex. 3 (email describing Khaleghi's start date
19 for ESA). Khaleghi blames Capistanti and seeks to hold Defendants liable for what he
20 claims to have been a delay in his start date.

21 Hutson, prior to Khaleghi's formal offer, learned that Capistanti had "made a
22 comment to a co-worker that he hoped that [Hutson] carefully checked Mr. Khaleghi's
23 references." *Id.* ¶ 22. Someone other than Capistanti informed Hutson of this comment,
24 and Hutson decided to follow up with Capistanti. *Id.* Hutson asserts that Capistanti did
25 not affect his decision to hire Khaleghi and that he also orally reprimanded Capistanti for
26 the prank phone calls from a year earlier. *Id.* ¶¶ 23-29. Khaleghi began working at ESA
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1 on July 16, 2011, and never had a break in service between there and DVA. *Id.*; *see also*
2 *id.*, Ex. 4.

3 In addition to these claims, Khaleghi also asserts a discrimination claim based on
4 allegations that Hutson made sexually demeaning comments about women and sexual
5 matters to him. Although, Hutson admitted in his deposition that he commented on the
6 attractiveness of a female (not a co-worker), he does not recall the extent of his
7 comments. Khaleghi claims that such comments are not appreciated by him and are
8 considered inappropriate within his culture; however, he does not allege any other basis
9 on which to believe or claim that Hutson made his comments, whatever they were, in
10 relation to Khaleghi being Iranian. Nor does Khaleghi allege any other instance in which
11 Hutson made such a comment after Khaleghi informed Hutson that he did not appreciate
12 the comment.

13 **B. Retaliation Claim, Discharge from DSHS**

14 Khaleghi alleges Defendants discharged him to retaliate for his opposing what he
15 believed to be a matter of potential workplace sexual discrimination effected upon a
16 coworker. Complaint ¶ 2.4. Defendants oppose this claim on the basis that the individual
17 for which Khaleghi intervened never claimed, and did not believe that she was the victim
18 of sexual discrimination, and Defendants' investigation in the matter resulted in no
19 finding of discrimination.

20 When Khaleghi began the OSD director, Diana Harder was assigned to and served
21 as Khaleghi's confidential secretary. Declaration of Diana Harder (Harder Decl.) ¶ 4.
22 Harder believed, based on statements by Khaleghi, that he did not wish to have a
23 secretary. *See id.* ¶ 6. Based on this belief, Harder requested a transfer and was
24 reassigned to a different director, Leo Ribas ("Ribas"). *Id.* ¶ 8. It is undisputed that she
25 and Ribas are longtime friends and colleagues. *See, e.g., id.* Hutson approved Harder's
26 transfer. *Id.* ¶ 9; Hutson Decl., ¶¶ 33-34.

1 Dianne Scott had a problem with Harder's transfer. Scott was an administrative
2 assistant with CSD and was formerly supervised by Harder. It is undisputed that Scott and
3 Harder did not get along well during the time Harder supervised Scott. *See, e.g.*,
4 Declaration of Matthew Kuhen (Kuhen Decl.); Khaleghi Dep. At 118-120. It is
5 undisputed that Scott believed that Harder had a bed made up for Ribas at her house for
6 when he worked late. Khaleghi Dep. at 120-121.

7 Scott believed that the relationship between Harder and Ribas would negatively
8 affect her employment at ESA. She made this concern known to Khaleghi. *Id.* at 121-122.
9 Although Scott never said as much, Khaleghi believed that Scott may have been
10 complaining about a *quid pro quo* sexual discrimination scenario in which Ribas was
11 obtaining a sexually based exchange for Harder's success at ESA and that Scott would
12 not have such benefits because she was not a part of any *quid pro quo* situation with
13 Ribas. *See, e.g.*, Complaint 2.4; Khaleghi Dep. at 122. In fact, it is undisputed that Scott
14 herself did not believe that Ribas and Harder were engaged in any sexually inappropriate
15 work relationship.

16 On behalf of Scott, Khaleghi voiced the matter to Hutson and urged Hutson to
17 formally investigate the matter. *See, e.g.*, Khaleghi Dep. at 121-122. Khaleghi claims that
18 Hutson told him to take the matter up with Ribas directly and did not believe that a formal
19 investigation was necessary. Khaleghi supplied Hutson with materials from the Equal
20 Employment Opportunity Commission ("EEOC") regarding when formal investigations
21 should be made with respect to claims, even when the claimant does not use the words
22 "sexual harassment." *Id.* at 124.

23 However, Hutson did initiate a formal investigation that was not conducted by
24 Ribas and resulted in a finding that no discrimination had occurred. Khaleghi claims to
25 have been unaware of this investigation at the time he was employed with OSD. Khaleghi
26 Dep. at 123. Khaleghi, having now become aware of the investigation and its results
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1 through this litigation, does not allege any improprieties with the investigation. *See id.* at
2 131 (stating that, other than his suspicions, he finds nothing inadequate about the
3 investigation).

4 Instead, Khaleghi claims that, as a result of his bringing Scott's complaint to
5 Hutson and having to talk with Ribas, he was shut out of the directors' circle for emails,
6 meetings, and the like. In opposition, Defendants point out that, immediately after
7 Khaleghi mentioned his belief that he was being retaliated against for making Scott's
8 claim known, that he was invited and had only been inadvertently excluded prior to that
9 time from the other directors' meetings. *See, e.g.*, Hutson Decl. ¶ 41.

10 Additionally, in opposition to Khaleghi's over-arching retaliatory discharge claim,
11 Hutson asserts that he was displeased with Khaleghi's performance as OSD. Specifically,
12 Hutson claims that Khaleghi was insufficiently prepared for meetings, failed to complete
13 tasks, and acted insubordinately when Khaleghi discussed a potential reorganization plan
14 with his team that Hutson believed to be a matter discussed in confidence with the
15 director team. *See, e.g., id.* ¶¶ 44-45.

16 As a result of Hutson's concerns, Defendants claim, he informed the OSD
17 management team that he was considering Khaleghi's future with ESA. *Id.* ¶ 49; *see also*
18 Khaleghi Dep. at 145-146 (stating that Hutson mentioned that Khaleghi was not a "good
19 fit" for the OSD director position). Hutson made his concerns about Khaleghi not being a
20 good fit known to Khaleghi on November 17, 2008. *Id.* On November 18, 2008, Hutson
21 met with Khaleghi and claims that he informed him that he would be asked to leave ESA.
22 *See* Hutson Decl. ¶ 51. In contrast, Khaleghi claims he was merely informed by Hutson
23 that he would receive "something" via email regarding his future with ESA. Khaleghi
24 Dep. at 148-49. However, there is no dispute that Khaleghi received via email a draft
25 announcement stating that he was leaving his position at ESA. *Id.* at 149; Hutson Decl. ¶
26 52, Attachment 7 (copy of draft announcement). Hutson apparently asked Shannon
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1 Wallace (“Wallace”), ESA’s public relations manager, to send Khaleghi the draft
2 announcement, which she did on November 18, 2008 at 6:30 p.m. Khaleghi Dep. at 149.
3 Hutson maintains that he was attempting to provide Khaleghi with a graceful exit from
4 ESA and envisioned that he would exercise his rights to revert to DVA.

5 On November 19, 2008, Khaleghi sent emails to Hutson and other Human
6 Resources employees at ESA to inform them that he planned to remain as director and
7 that he had filed an EEOC complaint against Hutson. In response, Hutson had Khaleghi
8 placed on administrative leave for his final two weeks at ESA and Khaleghi was removed
9 from the workplace. Hutson Decl. ¶ 53.

10 Khaleghi’s attempt to revert to DVA proved unsuccessful because his previous
11 position was already filled. Instead of reverting, DVA laid Khaleghi off from work.
12 Khaleghi filed his formal EEOC complaint on December 8, 2008. Khaleghi Dep. at 164.

14 III. DISCUSSION

15 Based on the foregoing factual background, Khaleghi alleges (1) that he was
16 subject to a hostile work environment and disparate treatment on account of his protected
17 status as an Iranian-born American and (2) that Defendants terminated him in retaliation
18 for opposing discriminatory acts against a fellow employee. Complaint ¶¶ 3.1, 3.2
19 (alleging violations of Title VII and WLAD)

20 A. Summary Judgment Standard

21 Summary judgment is proper only if the pleadings, the discovery and disclosure
22 materials on file, and any affidavits show that there is no genuine issue as to any material
23 fact and that the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c).
24 The moving party is entitled to judgment as a matter of law when the nonmoving party
25 fails to make a sufficient showing on an essential element of a claim in the case on which
26 the nonmoving party has the burden of proof. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323
27 (1986). There is no genuine issue of fact for trial where the record, taken as a whole,
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1 could not lead a rational trier of fact to find for the nonmoving party. *Matsushita Elec.*
2 *Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986) (nonmoving party must
3 present specific, significant probative evidence, not simply “some metaphysical doubt”).
4 *See also* Fed. R. Civ. P. 56(e). Conversely, a genuine dispute over a material fact exists if
5 there is sufficient evidence supporting the claimed factual dispute, requiring a judge or
6 jury to resolve the differing versions of the truth. *Anderson v. Liberty Lobby, Inc.*, 477
7 U.S. 242, 253 (1986); *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass’n*, 809 F.2d
8 626, 630 (9th Cir. 1987).

9 The determination of the existence of a material fact is often a close question. The
10 Court must consider the substantive evidentiary burden that the nonmoving party must
11 meet at trial -, e.g., a preponderance of the evidence in most civil cases. *Anderson*, 477
12 U.S. at 254; *T.W. Elec. Serv., Inc.*, 809 F.2d at 630. The Court must resolve any factual
13 issues of controversy in favor of the nonmoving party only when the facts specifically
14 attested by that party contradict facts specifically attested by the moving party. The
15 nonmoving party may not merely state that it will discredit the moving party’s evidence at
16 trial, in the hopes that evidence can be developed at trial to support the claim. *T.W. Elec.*
17 *Serv., Inc.*, 809 F.2d at 630 (relying on *Anderson*, 477 U.S. at 255). Conclusory,
18 nonspecific statements in affidavits are not sufficient, and missing facts will not be
19 presumed. *Lujan v. Nat’l Wildlife Fed’n*, 497 U.S. 871, 888-89 (1990).

21 Additionally, in employment discrimination cases, summary judgment should be
22 granted sparingly because the issues in such cases typically are questions of fact. *See*,
23 *e.g., Yartzoff v. Thomas*, 809 F.2d 1371, 1377 (9th Cir. 1987).

24 **B. Disparate Treatment**

25 Khaleghi alleges that Defendants treated him differently than his coworkers based
26 upon his ethnicity and national origin, Iranian-born American. Where a plaintiff, as here,
27 offers only circumstantial evidence of disparate treatment, the Supreme Court has
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1 established “a basic allocation of burdens and order of proof in a disparate treatment case,
2 [under] *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973); *Texas Dept. of*
3 *Community Affairs v. Burdine*, 450 U.S. 248 (1981), as modified by *Desert Palace v.*
4 *Costa*, 539 U.S. 90 (2003).” *Davis v. NPC Pizza Hut*, 447 F. Supp.2d 1260, 1266 (N. D.
5 Ala., 2006). “[T]he plaintiff first has the burden of establishing a *prima facie* case of
6 discrimination, which creates a rebuttable presumption that the employer acted illegally.”
7 *McCalister v. Hillsborough County Sheriff*, 211 F. App’x 883, 884-85 (11th Cir. 2006).

8 “To set out a *prima facie* case, the plaintiff may show that: (1) he is a member of a
9 protected class; (2) he was qualified for the position; (3) he suffered an adverse
10 employment action; and (4) he was replaced by a person outside his protected class or
11 was treated less favorably than a similarly-situated individual outside his protected class.”
12 *Maynard v. Bd. of Regents of the Univs. of the Fla. Dep’t of Educ.*, 342 F.3d 1281, 1289
13 (11th Cir. 2003); *see also Domingo v. Boeing Employees’ Credit Union*, 124 Wn. App.
14 71, 81 (2004) (same).

15 Here, there is no dispute that Khaleghi meets the first element based on his
16 national origin. Given that Defendants hired Khaleghi, he was presumably qualified for
17 the position even though he did not exactly match the criteria for the ideal candidate as
18 sought by Hutson for the position of OSD director. Khaleghi could also establish the
19 fourth element because he was replaced by a person outside of his protected class.
20 However, Khaleghi cannot establish an adverse employment action because he was hired
21 for the position he sought. Thus, Khaleghi has not, based on the current record,
22 established a *prima facie* case for disparate treatment. Additionally, Khaleghi has not
23 provided competent evidence and/or adequate authority to establish that Hutson’s isolated
24 comment(s) about the attractiveness of a female is sufficient as a basis on which to
25 support his discrimination claims in this case.
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1 However, and possibly more important, Khaleghi did establish a *prima facie* case
2 of discrimination on the basis of race, Defendants may shift the burden back to him by
3 providing legitimate, nondiscriminatory reasons for the challenged employment action.
4 *E.g., Burdine*, 450 U.S. at 257. Defendants’ “burden of rebuttal is exceedingly light.”
5 *Cooper v. Southern Co.*, 390 F.3d 695, 725 (11th Cir. 2004). Once Defendants proffered a
6 nondiscriminatory reason for Khaleghi’s termination, he “then has the ultimate burden of
7 proving the reason to be a pretext for unlawful discrimination.” *Denney v. City of Albany*,
8 247 F.3d 1172, 1183 (11th Cir. 2001); *see also Pannell v. Food Servs. of Am.*, 61 Wn.
9 App. 418, 432 (1991), *rev denied*, 118 Wn.2d 1008 (1992).

10 Here, Defendants assert that the alleged delay in Khaleghi’s hire, if any, seems to
11 have been caused by a mis communication that led to Khaleghi announcing his departure
12 from DVA earlier than appropriate. Nonetheless, the claimed two-week perceived delay
13 is not actionable as discrimination because there is no competent evidence proffered by
14 Khaleghi that Defendants’ reasonable explanation of the matter is merely a pretext to
15 cover for racial discrimination resulting in the alleged disparate treatment: (1) he was
16 hired for the position he applied for, and (2) he began that position on July 16, 2008 – the
17 day Hutson planned for him to start, only two weeks after Khaleghi thought he was to
18 begin following a reference check. Simply put, the two-week delay is *de minimis* even if
19 the delay partially resulted from Hutson’s desire to follow up on Capistanti’s claims about
20 Khaleghi’s references needing to be checked.³

21 In considering the record and relevant authority, the Court finds that Khaleghi has
22 failed to carry his burden to provide competent evidence to establish that the reason
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25 ³To the extent Khaleghi has alleged a discrimination claim tied solely to the prank calls
26 made by Capistanti, he has not provided adequate authority on which Defendants could be held
27 liable for acts of a DVA employee that occurred well before he was hired to work at ESA.
28 Moreover, he has not shown an adverse employment action as a result of Capistanti’s prank
calls.

1 proffered for terminating his employment was merely a pretext. Further, Khaleghi has not
2 supplied adequate case law for the proposition that the absence of a motivation other than
3 race is cause to find a pretext.

4 Therefore, the Court grants summary judgment in favor of Defendants on
5 Khaleghi's disparate treatment theory.

6 **C. Retaliatory Discharge**

7 Khaleghi asserts that his termination from ESA was retaliatory based on his
8 conduct of bringing to Hutson's attention a potential sexual harassment situation on
9 behalf of Scott and later filing an EEOC complaint. He argues, after raising Scott's issue
10 to Hutson he felt cutoff and ostracized from the directors' circle. He also argues that he
11 was not terminated until after he informed Hutson that he had filed an EEOC complaint
12 against him regarding this matter. In opposition, Defendants argue that Hutson terminated
13 Khaleghi, or at least informed him that he would be terminated, on November 18, 2008.
14 And yet, Khaleghi did not inform Hutson of the EEOC complaint until November 19,
15 2008. With this in mind, the Court turns to the analytical framework applicable to
16 Khaleghi's claim of discrimination.

17 To establish a retaliation claim under Title VII⁴, "a plaintiff must show (1)
18 involvement in a protected activity, (2) an adverse employment action and (3) a causal
19 link between the two." *Brooks v. City of San Mateo*, 229 F.3d 917, 928 (9th Cir. 2000)
20 (citing *Payne v. Norwest Corp.*, 113 F.3d 1079 (9th Cir. 1997)). "The causal link between
21 a protected activity and the alleged retaliatory action can be inferred from timing alone
22 when there is a close proximity between the two." *Thomas v. City of Beaverton*, 379 F.3d
23 802, 812 (9th Cir. 2004); *see, e.g.*, *Yartzoff*, 809 F.2d at 1376 (9th Cir. 1987) (holding that
24 sufficient evidence of causation existed where adverse employment action occurred less
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27 ⁴The parties agree that the same analytical framework applies to Khaleghi's WLAD claim
28 for the alleged retaliatory conduct.

1 than three months after the protected activity); *Miller v. Fairchild Indus., Inc.*, 797 F.2d
2 727, 731-32 (9th Cir. 1986) (concluding that there was adequate evidence of a causal link
3 where the retaliatory action occurred less than two months after the protected activity).

4 After a plaintiff establishes a *prima facie* case for discrimination then “the burden
5 of production shifts to the employer to present legitimate reasons for the adverse
6 employment action. Once the employer carries this burden, a plaintiff must demonstrate a
7 genuine issue of material fact as to whether the reason advanced by the employer was a
8 pretext. Only then does the case proceed beyond the summary judgment stage.” *Id.* As
9 this Court has said before, Khaleghi must first successfully navigate this burden shifting
10 process before he can succeed on his retaliatory discharge theory. Dkt. 46 (order denying
11 Khaleghi’s motion for summary judgment); *see also, e.g., Yartzof*, 809 F.2d at 1373.

12 There is no dispute that Khaleghi’s act of reporting what he believed to be a case
13 of sexual harassment on behalf of Scott would be considered protected activity.⁵ Khaleghi
14 could also likely establish the adverse action element by pointing to the fact that he was
15 terminated from ESA, notwithstanding the theoretical reversion to DVA.

16 As to the causal link, the Court is somewhat persuaded by Khaleghi’s position. In
17 *Yartzof*, the Ninth Circuit found that a causal link based on the temporal proximity of the
18 protected conduct and the termination. There, Yartzof had received positive feedback
19 regarding his performance and then shortly after filing his EEOC complaint, he
20 experienced an adverse action. The *Yartzoff* court found that such was sufficient evidence
21 to establish the *prima facie* case of retaliation.

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24 ⁵The parties do dispute whether sexual harassment was actually occurring, given that a
25 such illegal conduct was not found in the investigation that Hutson ordered, and Scott did not
26 herself believe she was reporting sexual harassment. However, Defendants have not provided
27 adequate authority to establish that these facts would be dispositive of Khaleghi’s claim. If
28 Khaleghi had a reasonable basis on which to raise his concerns, then his conduct would be
protected. Further, his EEOC complaint is protected activity that would start the burden shifting
process in the face of an adverse employment action.

1 Here, the parties dispute when Khaleghi was actually fired. He admits that Hutson
2 informed him that his job was in question. He admits receiving a draft of a resignation
3 letter, written for him by Wallace. And it was not until one day after these events that
4 Khaleghi informed Hutson that he had filed the EEOC complaint and Hutson had
5 Khaleghi escorted off of the property and put on administrative leave for his final two
6 weeks at ESA. However, Khaleghi argues that he was unaware that he was being given
7 the option of a “graceful exit” and that otherwise he would simply be fired from ESA. He
8 also argues that the draft resignation came to him from Wallace and he did not view a
9 letter from her as being the correct means by which a “graceful exit” or firing would
10 occur. Further he argues that Hutson had informed him that he was doing well in the
11 position and that he was surprised with how much Khaleghi was able to accomplish and
12 take on in such a short time of employ.

14 In short, Khaleghi argues that he had no reason to believe his job was in jeopardy
15 and that Hutson did not fire him until he was escorted off the work premises following his
16 disclosure that he had filed an EEOC complaint against Hutson. The timing of these
17 events is probative and sufficiently establishes the requisite causal link for purposes of
18 resolving the instant motion. Thus, Khaleghi has established a *prima facie* case for his
19 retaliation claim. However, Khaleghi must still navigate the burden shifting framework
20 discussed in *Yartzoff*:

21 In Title VII retaliation cases, once the plaintiff has established a
22 *prima facie* case, the burden of production shifts to the defendant to
23 articulate a legitimate, non-retaliatory explanation for its decisions. Only
24 the burden of production shifts; the ultimate burden of persuasion remains
25 with the plaintiff. The employer need not persuade the court that it was
actually motivated by the proffered reasons: It is sufficient if the defendant's
evidence raises a genuine issue of fact as to whether it discriminated against
the plaintiff.

26 809 F.2d at 1376 (citations and quotations omitted). Thus, like in *Yartzoff*, Defendants
27 “need only produce admissible evidence which would allow the trier of fact rationally to

1 conclude that the employment decision had not been motivated by discriminatory
2 animus." *Id.* (citing *Miller v. Fairchild Indus., Inc.*, 797 F.2d 727, 731 (9th Cir. 1986)
3 (quoting *Burdine*, 450 U.S. at 257).

4 Here, Defendants have articulated such a non-retaliatory explanation for
5 terminating Khaleghi's employment: he acted insubordinately, did not adequately prepare
6 for meetings, and was ultimately not a good fit for the position of OSD director. This
7 proffered reason, which is supported by declarations, depositions, and documentary
8 evidence is sufficient to shift the burden of production back to Khaleghi:
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10 If the defendant carries the burden of satisfactorily articulating a
11 legitimate, non-retaliatory reason at trial, the legally mandatory inference of
12 retaliatory discrimination arising from the plaintiff's prima facie case drops
13 away. *See Burdine*, 450 U.S. at 255 & n. 10. The burden of production
14 shifts back to the plaintiff to show that the alleged explanation is a pretext
15 for impermissible retaliation. This burden thus merges with the plaintiff's
16 ultimate burden of persuading the court that he is the victim of retaliation.
17 *See id.* at 256. The plaintiff may succeed "either directly by persuading the
18 court that a discriminatory reason more likely motivated the employer or
19 indirectly by showing that the employer's proffered explanation is
20 unworthy of credence." *Id.* Evidence already introduced to establish the
21 prima facie case may be considered, and "[i]ndeed, there may be some
22 cases where the plaintiff's initial evidence, combined with effective
23 cross-examination of the defendant, will suffice to discredit the defendant's
24 explanation." *Id.* at 255 n. 10; *accord Miller*, 797 F.2d at 732; *Williams*,
25 792 F.2d at 1486; *Lowe*, 775 F.2d at 1008. Accordingly, this court has
observed that a grant of summary judgment, though appropriate when
evidence of discriminatory intent is totally lacking, is generally unsuitable
in Title VII cases in which the plaintiff has established a prima facie case
because of the "'elusive factual question'" of intentional discrimination.
Miller, 797 F.2d at 732-33 (quoting *Burdine*, 450 U.S. at 255 n. 8); *Lowe*,
775 F.2d at 1009, as amended, 784 F.2d at 1407; *see Schuler v. Chronicle
Broadcasting Co.*, 793 F.2d 1010, 1011-12 (9th Cir.1986); *Steckl v.
Motorola, Inc.*, 703 F.2d 392, 393 (9th Cir.1983).

26 809 F.2d at 1377.

27 Khaleghi argues that Hutson, at the time he was terminated, gave only the
28 unadorned "you're not a good fit" as his reason for terminating Khaleghi. Khaleghi
argues that all of the proffered reasons given in the current record were created from

1 whole cloth for the purposes of this case and, presumably, were untrue at the time of his
2 termination.

3 In opposition, Defendants argue that Khaleghi's reasoning is unpersuasive
4 considering that (1) Khaleghi only perceived to be cut off from meetings and the other
5 directors but was included as soon as he raised the issue; (2) Hutson had a meeting with
6 Khaleghi and his management team to discuss what was perceived to be an act of
7 insubordination and to inform Khaleghi that his future with ESA was uncertain; and (3)
8 that Khaleghi received a draft of his resignation email one day prior to informing Hutson
9 of the EEOC complaint.

10 A question of fact exists in this case as to whether Khaleghi's termination was
11 retaliatory given the fact that (1) it is unclear when Khaleghi was actually fired, (2) he did
12 not understand he was fired until after informing Hutson of the EEOC complaint, and (3)
13 his firing so closely trailed his involvement in what reasonably may have been thought to
14 be valid a sexual discrimination claim filed on behalf of Scott.

15 Therefore, while it is a close question, the Court in considering the facts in the
16 light most favorable to Khaleghi denies Defendants' motion for summary judgment on
17 the issue of retaliation.

19 **IV. ORDER**

20 Therefore, it is hereby **ORDERED** that Defendants' motion for partial summary
21 judgment (Dkt. 47) is **DENIED in part** and **GRANTED in part** as discussed herein.

22 DATED this 26th day of July, 2011.

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BENJAMIN H. SETTLE
United States District Judge